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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 1048

HARRY G. SILVERSTEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 29a–40a)[1] is reported at 210 F. Supp. 401. The opinion of the court of appeals (Pet. 1a–6a) is reported at 314 F. 2d 789.

JURISDICTION

The decision of the court of appeals was entered on March 12, 1963 (Pet. 1a–6a). The petition for a writ of certiorari was filed on April 25, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "R." refers to the appendix to petitioner's brief in the court of appeals.

QUESTION PRESENTED

Whether, in the circumstances of this case, several partnerships, each having a large number of limited partners, were sufficiently impersonal in character so that a general partner could be required to produce books belonging to the partnerships, despite his plea that production would tend to incriminate him.

STATUTE INVOLVED

Internal Revenue Code of 1954 (26 U.S.C. 7602):

> SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.
>
> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data,

and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry."

STATEMENT

On May 16, 1961, petitioner was served by Special Agent Alfred S. Klass with an Internal Revenue summons issued under Section 7602 of the 1954 Internal Revenue Code (R. 11a–13a). This summons was issued in furtherance of an investigation of the tax liabilities of petitioner, his wife, his son, his daughter, his son-in-law, and his daughter-in-law for the years 1955 through 1960. It required petitioner to appear before Agent Klass on May 26, 1961, and to produce certain books, records, and papers belonging to five specified limited partnerships, to wit: 212–24 East 23rd Street Company, 305 East 47 Company, Medical Arts Building Company, Decorative Arts Building Company, and Varick–44th Street Company (R. 11a–12a, 19a–20a).

Petitioner appeared before the agent on the return date of the summons and testified briefly (R. 14a–17a). He was asked if he had brought with him all of the records called for by the summons, to which he replied that he had brought all those which existed (R. 15a–16a). When he was asked to produce the records, he refused to do so on the ground they might tend to incriminate him (R. 17a).

The instant case was begun on August 2, 1962, when the United States Attorney filed in the district court a motion for an order directing compliance with the

summons (R. 1a, 3a). This motion was accompanied by the affidavits of an Assistant United States Attorney (R. 4a–5a) and of Special Agent Klass (R. 6a–10a). Subsequently petitioner filed two affidavits of his own (R. 18a–28a).

The various affidavits and other documents submitted to the district court established the following undisputed facts: Petitioner is a real estate syndicator (R. 7a–8a, 15a). Each of the five partnerships involved in this case owns and receives rents from real property, and petitioner, his son, and his son-in-law are the sole general partners in each (R. 19a–20a). Each is, however, a syndicate composed of numerous limited partners, ranging from twenty-five to well over one hundred, participating with the general partners. The capitalization of the syndicates runs from $225,000 to $2,740,000 (R. 8a–9a). Management of the real estate owned by the syndicates has been placed in the hands of a sixth partnership in which petitioner, his son, and son-in-law are the sole participants[2] (R. 9a, 20a–21a, 24a–27a). The five syndicates have no separate office, but are listed as occupying the office of the management partnership (R. 10a, 27a). The limited partners have the right to have the books and records of their respective syndicates maintained in this office, and have the right to inspect them and to make copies (R. 9a–10a, 27a–28a, 39a). In at least three of the syndicates the general partners have agreed not to dispose of assets without the written consent of sixty percent of the limited

[2] The books and records of this management partnership are not here involved.

partners (R. 38a). The continuity of the syndicates is not affected by the sale of a limited partners' interest (R. 9a), nor is it necessarily affected by the death or withdrawal of one of the general partners (R. 9a, 20a).

The district court held that the partnerships were so large and impersonal that they did not embody purely private interests, but rather common or group interests only, and that petitioner's possession of the records was therefore in a representative, rather than in a personal, capacity (R. 36a–39a). The court entered an order on November 5, 1962, directing petitioner to comply with the summons (R. 41a–42a). The court of appeals affirmed, holding that, under *United States* v. *White*, 322 U.S. 694, "the size and extent of the operation here plus the close analogy to the corporate form lead us to conclude that appellant cannot assert his personal privilege to prevent the government from inspecting the books and records of the partnership that he holds" (Pet. 6a).

ARGUMENT

In *United States* v. *White*, 322 U.S. 694, this Court held that an officer of a labor union could not assert a Fifth Amendment privilege against self-incrimination as to records of the union since the Fifth Amendment protects persons only from producing their own private records and the privilege "can not be utilized by or on behalf of any organization, such as a corporation." *Id.* at 699. The Court went on to state that (*id.* at 701):

> The test * * * is whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only. * * * Labor unions—national or local, incorporated or unincorporated—clearly meet that test.
>
> Structurally and functionally, a labor union is an institution which involves more than the private or personal interests of its members. It represents organized, institutional activity as contrasted with wholly individual activity.

This standard has been several times applied to require the production of books of unincorporated associations by their officers. *McPhaul* v. *United States*, 364 U.S. 372, 380; *Rogers* v. *United States*, 340 U.S. 367, 371–372; *United States* v. *Fleischman*, 339 U.S. 349, 358.

The present case involves merely the application of the standards laid down in the *White* case to particular circumstances. As the court of appeals stated, "[t]he inquiry is * * * essentially a factual one into the nature of the particular entity" (Pet. 4a). We submit that review of the established principle is not warranted and that the court of appeals' determination in this case was correct.

In the instant case, the books belonged to five syndicates each having from 25 to 147 limited partners

(R. 19a-20a, 35a-36a; Pet. 2a). They are capitalized at from $225,000 to $2,740,000, including three over $1,000,000 (R. 35a-36a). Most of the capital came from the limited partners (R. 37a). The general partners have, in many respects, the position of agents representing the limited partners. Thus, the limited partners have priority as to income and proceeds of liquidation (R. 37a); the general partners cannot sell partnership property without the consent of sixty percent of the limited partners (R. 38a); and the management partnership, which is composed of the three general partners in the other partnerships, receives fixed compensation and commission for performing this function (R. 38a).

As the courts below noted (R. 39a, Pet. 5a-6a), limited partnerships, under New York law, are organized similarly to corporations. For example, the limited partners are not personally liable, the continuity of the partnerships would not necessarily be affected by changes in ownership through death or sale by either the limited or general partners, and the books must be available for the inspection of the limited partners. Consequently, the district court was amply warranted in finding that each of the five syndicates "is not a 'small family partnership' but is in the language of the *White* case, 'so impersonal in the scope and membership of its activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to

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Documents in the record before the court of appeals, not forwarded to this Court, indicated that there were 147 limited partners in the Varick-44th Street Company.

embody their common or group interests only'" (R. 36a). This finding was specifically affirmed by the court of appeals (Pet. 5a).

The decision below is not unique. Several other courts, applying the principles of *White*, have likewise held that limited partnerships (*United States* v. *Wernes*, 157 F. 2d 797 (C.A. 7)), and even large general partnerships (*United States* v. *Onassis*, 133 F. Supp. 327 (S.D. N.Y.), and *United States* v. *Onassis*, 125 F. Supp. 190 (D.C. D.C.)), may be impersonal in character and therefore their books not protected from disclosure by the Fifth Amendment. Thus, the decision below in this case is fully consistent with the applicable decisions of this court and the lower federal courts.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1963.